APPENDIX

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Opinions Below

1. The opinion of the Special Court of Appeals of Maryland is reported at 2 Md. App. 1 and 233 A. 2d 342; the portions thereof that consider the Federal question (2 Md. App. at 6-8, 233 A. 2d at 346-347) are set forth above, pp. 00-00. The dissenting opinion of Thompson, J. (2d Md. App. at 38-39, 233 A. 2d at 364-365) does not consider the Federal question.

2. The opinion of the Court of Appeals of Maryland is reported at 245 A. 2d 814, and is as follows (less the dissenting opinion of Barnes, J., at pp. 821-830, which does not consider the Federal question):

IN THE COURT OF APPEALS OF MARYLAND

No. 323

September Term, 1967

WILLIAM M. LOKER, JR.

v.

STATE OF MARYLAND

Hammond, C. J.
Barnes
Singley
Smith
Keating, Thomas J., Jr.* (specially assigned)
Rutledge, Irvine H. (specially assigned)
Clapp, Robert E., Jr. (specially assigned),

JJ.

Opinion by Clapp, J.
Barnes, J. dissents.

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* Keating, J., participated in the hearing of the case and in the conference in regard to its decision, but did not take part in the adoption of the opinion since he had retired prior to the filing of the opinion.

Filed: September 27, 1968

This case is here on writ of certiorari to the Court of Special Appeals issued pursuant to Sec. 21A of Art. 5 of the Annotated Code of Maryland (1968 Repl. Vol.). On May 24, 1966, the appellant was convicted by a jury in the Circuit Court for St. Mary's County on the second and fourth counts of an indictment, which counts, respectively, charged a violation of Art. 27, Sec. 129 of the Code (embezzlement by a clerk, servant, or agent or officer); and the commission of the crime of grand larceny. He was sentenced to imprisonment for a term of five (5) years for each offense, the sentences to run concurrently, and an appeal was noted to this Court and received Docket No. 380—September Term, 1966. After the brief for the appellant had been here filed, the case was transferred to the then newly created Court of Special Appeals which affirmed the judgment. *Loker* v. *State,* 2 Md. App. 1, 233 A. 2d 342.

Following this affirmance a petition for the writ of certiorari was filed in this Court setting forth grounds hereinafter specified in detail and it was ordered on the 16th day of November, 1967, that the writ should issue and that the case be transferred to the regular docket as No. 323—September Term, 1967.

In his petition, the appellant raises the following issues:

I

The writ should be issued so that this Court may review that aspect of the Special Court's decision which brushed aside petitioner's showing that the indicting grand jury was not selected in the manner prescribed by the statutes of this State.

II

The writ should be issued in this case because the Special Court has disregarded the ruling of this Court in *Schrowgurow* v. *State,* 240 Md. 121, 213 A. 2d 475 (1965); and *Madison* v. *State,* 240 Md. 265, 213 A. 2d 880 (1965).

III

The writ should be issued to enable this Court to review the ruling of the Special Court to the effect that a public official who embezzles public funds can be prosecuted under either the general embezzlement statute or the statute condemning embezzlement by a public official.

IV

The writ should be issued so that this Court can review the ruling of the Special Court to the effect that a public official who removes public funds from a safe in *his* possession commits larceny rather than embezzlement.

V

The writ should be issued so that this Court can review the decision of the Special Court that the so-called "less cash" transactions constituted a crime against the Town, and not against the two banks involved.

VI

The writ should be issued so that this Court can review the conclusion of the Special Court that the State met its burden, as to the larceny conviction, of adducing circumstantial evidence which, "taken together, must be inconsistent with, or such as to exclude, every reasonable hypothesis or theory of innocence."

THE MOTION TO DISMISS THE INDICTMENT

Appellant's issues I and II were raised in the Circuit Court by a motion to dismiss the indictment, which motion was overruled, after hearing and before trial on a not guilty plea pursuant to Maryland Rule 725. They were fully and adequately dealt with by the Court of Special Appeals which found no error in the denial of the motion to dismiss in which ruling we concur for the reasons stated by that Court. 2 Md. App. 5-16, 233 A. 2d, 346-352. That

Court neither brushed aside the contentions of the appellant nor disregarded the rulings of this Court.

The Facts

In view of the careful and detailed summary of the facts upon which this prosecution is based, found in the opinion of the Court of Special Appeals, 2 Md. App. 16-20, 233 A. 2d, 352-354, we deem it unnecessary to repeat them here and shall proceed to a discussion of the remaining issues raised by the petition for the writ of certiorari.

The Conviction of Embezzlement

(a) The statutes involved.

The appellant contends under his issue III that he, as treasurer of the Town of Leonardtown, was a public officer within the meaning of Sec. 138 of Art. 27 of the Code (embezzlement by elected or appointed public officers required by law to account) and, therefore, could not be prosecuted and convicted under Sec. 129 of Art. 27 proscribing embezzlement by cashiers, servants, agents, officers or clerks to any body corporate. The Court of Special Appeals held that the appellant was a public officer within the meaning of Sec. 138 but that he could, also, be tried and convicted under Sec. 129. We agree with the affirmance of the conviction under Sec. 129 but not for the reasons stated by the Court of Special Appeals.

For the purposes of this opinion, we accept, without deciding, the assumption of the parties and of the Court of Special Appeals that the appellant was a public officer within the meaning of Sec. 138 and proceed to a discussion of his contention that public officers may only be prosecuted under that section and not under Sec. 129.

An examination of the legislative and judicial history of the two sections demonstrates the fallacy of this contention. Sec. 129 was first adopted by Chapter 162 of the Acts of 1820 and punished embezzlement by a "cashier,

servant, agent or clerk ..... to any person or persons whosoever, or to any body corporate or politic." Here, it should be noted that officers of neither public nor private corporations were subject to prosecution thereunder.

Sec. 138 relating to embezzlement by the described public officers was first enacted by Chapter 196 of the Acts of 1854 (erroneously designated in the 1967 Replacement Volume of the 1957 Code as Ch. 196 of the Acts of 1884). Obviously, at that time there was neither conflict nor inconsistency between the two Acts, because the Act of 1820 had no application to public officers or bodies politic as distinguished from cashiers, servants, agents or clerks.

Both Acts were codified as Secs. 49 and 50 of Art. 30 of the Public General Laws of 1860 in which the phrase in the 1820 Act, "any body corporate or politic" appears as "any body corporate". This Code was adopted by the General Assembly by Chapter 1 of the Acts of 1860 in lieu of and as a substitute for all the Public General Laws and the Public Local Laws, heretofore passed by the Legislature of Maryland. Appellant, therefore, argues that this change in phraseology was intended to eliminate bodies politic from coverage under Sec. 129.

This contention is answered by the decision of our predecessors in *State* v. *Denton,* 74 Md. 517, 22 A. 305 and *Denton* v. *State,* 77 Md. 527, 26 A. 1022, holding that embezzlement by a clerk to the county commissioners is punishable under that section. In the former it was contended, just as here, that the appellant was a public officer, not subject to prosecution under Sec. 75 (now Sec. 129) although it was not conceded that he was subject to prosecution under Sec. 80 (now Sec. 138). In holding that he was not a public officer, but, as clerk, was subject to prosecution under present Sec. 129, the Court said, at page 521 of 74 Md., "The fact that he is clerk to a public corporation does not put him outside of Sec. 75 (now Sec. 129), because that section is broad enough to embrace public as well as private corporations."

It should be noted that at the time of that decision in 1891, Sec. 129 did not include officers as distinguished from cashiers, servants, agents or clerks. Thus the reason is apparent why the State Treasurer, indicted under Sec. 138, could not be charged under Section 129. See *State* v. *Archer*, 73 Md. 44, 20 A. 172 (1890).

With this background in mind, we turn to a consideration of Chapter 329 of the Acts of 1914. That Act amended Sec. 129 to include officers of any body corporate among those within its purview. In view of this Court's decision in *Denton*, it is apparent that officers of public as well as private corporations were intended by the Legislature to be included in the section.

There is no dispute, nor could there be in view of Sec. 94 of Art. 19 of the Code of Public Local Laws (Flack, 1930) that the Commissioners of Leonardtown are a public body corporate. We, therefore, hold that the appellant, even though assumed to be a public officer was subject to prosecution under Sec. 129. It is unnecessary to decide whether he, also, could be prosecuted under Sec. 138.

(b) The alleged variance.

As his fifth issue under the embezzlement conviction, the appellant contends that there is a fatal variance between the allegations of the second count of the indictment and the proof. This second count alleges embezzlement of United States Currency, "the property of the said Commissioners of Leonardtown."

There was evidence that the appellant, from time to time, received checks on account of the Town for taxes, water rents, etc., that these checks were restrictively endorsed for deposit only to the account of the Town and listed on a deposit slip for deposit in the Town's accounts. On the deposit slip the appellant designated the total amount of the checks with the notation "less cash" and upon presenting the deposit to the bank received, in cash the amount so

designated by him. Only the difference between the total amount of the checks and the cash received by him was credited to the Town's accounts. There was testimony that in some instances, the appellant asked a teller receiving deposits in this fashion to give him larger bills and said he was going to put them in the other bank. In fact, no deposits were made in the Town's other account. The appellant urges that the banks were obligated to credit the full amount represented by the checks to the accounts in the name of the town because of the restrictive endorsement of them for deposit only and that since this was not done, the cash given the appellant without authority was not the Town's money but the bank's money, the banks being liable to the Town for the full amount of the checks when they were collected. This argument is predicated upon the Code, Art. 11, Sec. 121 in effect at the time of these transactions providing that an endorsement of an item by a depositor "for deposit" was deemed a restrictive endorsement and indicated that the endorsee bank was an agent for collection and not the owner of them.

The Court of Special Appeals considered and rejected this argument and we agree with its decision and the reasons therefor.

We point out further that there is no specific requirement in Sec. 129 of Art. 27 that ownership of the money embezzled be either alleged or proved, the statute only requiring that the money, "shall be delivered to or received, or taken into possession by him for or in the name or on account of his ..... employer." It was judicially determined that the ownership of such money must be alleged in the indictment in *State* v. *Tracey*, 73 Md. 447, 21 A. 366, because the statute makes its violation larceny and the common law crime of larceny required an allegation of ownership of the stolen property. The Court of Special Appeals quite rightly pointed out that in indictments for larceny an allegation of the ownership of stolen goods may be supported by proof of any legal interest or special prop-

erty in the goods, *Richardson* v. *State,* 221 Md. 85, 156 A. 2d., 436, and we feel that no more stringent requirement with respect to embezzlement should be applied than to a claim of variance with respect to a charge of larceny.

Moreover, we point out that, even accepting the contention of the appellant that the money in the cash drawer of the teller, before delivery to the appellant, belonged to the bank, it is clear that this teller when such money was delivered by him to the appellant intended to pass title thereto to the Town. It can hardly be contended that this teller intended to deliver this cash for appellant's personal use. A secret intent on the part of the appellant to appropriate this money to his own use can hardly be used by the appellant as an argument to defeat a charge of embezzlement of the Town's money. Compare *Territory* v. *Hale,* 13 N.M. 181, 81 Pac. 583, 13 Ann. Cas. 551, a case dealing with embezzlement under the New Mexico statute. It is not in point on the facts but does deal with the ownership of monies improperly drawn from the general account of a county. It was there stated at page 190 as follows:

> "But when a check is drawn there is a segregation of that much money from the general funds of the bank which becomes the property of the depositor. This may be placed to the credit of the payee of the check, or it may be handed him in money, or otherwise disposed of as the parties may elect. *But for a space of time, however, the money of the depositor is being dealt with* * * * *". (Emphasis supplied)

So, also, here when the teller pursuant to the "less cash" deposit slip, segregated funds belonging to the banks and delivered such funds to the appellant, title thereto was in the Town of Leonardtown for a period of time however short. Cf., also, *State* v. *Lockie,* 43 Idaho 580, 253 Pac. 618. Reliance upon the intricacies of civil liability as between the Town of Leonardtown and the banks has little relevance to the criminal charge here involved and the

question of guilt or innocence is not dependent upon the many issues that can be raised in connection with the deposit of commercial paper, title thereto and the right to charge back credit given. For a discussion of these many issues that we find not relevant to a criminal trial for embezzlement see 10 Am Jur 2d, *Banks,* para. 402-413 inclusive. Civil liability as between the Town and the banks is an issue completely collateral to the criminal charge of embezzlement.

We hold, therefore, as did the Court of Special Appeals, "that there was sufficient evidence for the jury to find that the Town was the owner or had a legal interest or special property in the money and that therefore there was no fatal variance between the allegata and the probata."

THE CONVICTION OF LARCENY

(a) The sufficiency of the evidence.

The sixth issue of the appellant contends that the State failed to meet its burden as to the larceny conviction of adducing circumstantial evidence which, taken together, must be inconsistent with, or such as to exclude, every reasonable hypothesis or theory of innocence. This issue was fully discussed by the Court of Special Appeals which found no error in the denial of appellant's Motion for Judgment of Acquittal overruled by the Circuit Court. We concur in the holding and reasons of the Court of Special Appeals found in 2 Md. App. pp. 25-29, 233 A. 2d, 357-359.

(b) The possession of the funds allegedly stolen.

Appellant's fourth issue claims that the monies allegedly stolen, were taken from a safe in his possession and therefore, the crime committed, if any, was embezzlement rather than larceny. This issue presents the dilemma that Judge Prescott in his concurring opinion, prophesied would result from the decision of this Court in *Nolan* v. *State,* 213

Md. 298, 131 A. 2d 851, and discussed in 18 Md. L. R. 235. The Court of Special Appeals after an able discussion of the authorities decided this issue against the appellant and we agree with the holding of that Court but not with its reasons.

The entire argument of the appellant rests upon his contention that "the common law of larceny already is burdened with a number of aberrant doctrines; it does not need another. Specifically, it can do without a doctrine that theft by a corporate or public officer of funds to which he alone has access and which are received by virtue of his office is larceny."

He further argues, "that the facts in this case establish that the receptacle involved, the Town's safe, was itself in his possession as opposed to that of the Town. Since this was true, the funds, when placed in the safe by his secretaries or by him, remained in his constructive possession, so that any subsequent abstraction by him from the safe would be embezzlement, and not larceny."

The entire argument of the appellant is predicated upon a false premise, that is, the exclusive possession in himself of the safe and the funds therein. The record, however, is to the contrary. The safe, itself, at least after the formation of appellant's first law partnership was kept in the office of his partner's secretary who did most of the Town's collections and bookkeeping and was not in the office of the appellant. She, in fact, kept the Town's receipt books on her desk and each morning opened the safe.

Following the formation of appellant's second law partnership the safe was kept not in the office of the appellant but in the room just off the partnership reception room where there was a secretary. The office manager of the partnership sometimes handled Town business and on Saturdays when, apparently, only some of the partners and secretaries would be present, collected town taxes and put them in the desk drawer until the necessary

bookkeeping entries could be made by a secretary of the firm. All secretaries of the firm and all partners had access to this safe and the firm's funds were also kept therein.

Moreover, apparently as the business of the Town increased, it hired several employees to do the Town's work and, although they worked in the offices of appellant's law partnership, they were not on its payroll.

We agree that, "two elements necessary to constitute the crime of larceny in addition to the felonious intent are a physical taking and asportation of the thing taken from the actual or constructive possession of the owner." *Brown* v. *State,* 236 Md. 505, 513; 204 A. 2d, 532, but we find no violations of this rule in the decision of the Court of Special Appeals in this case. Clearly, of course, under our decision in *Nolan* v. *State, supra,* the defendant cannot be guilty of the larceny of money in his actual possession but the evidence in this case discloses that little if any of the money here involved ever came into the actual possession of the defendant except by the commission of the crime charged. The collection of Town funds by an employee paid by the Town or by the law office secretaries authorized to make such collections and placed in a receptacle owned by the Town without, in any way, passing first through the hands of the appellant, gave actual possession to the Town and the fact that the receptacle was located in the office of a partnership used also as the offices of the Town would be insufficient to give actual possession to the appellant. He answers this point by arguing that "the funds, when placed in the safe by his secretaries or by him, remained in his constructive possession, so that any subsequent abstraction by him, from the safe would be embezzlement and not larceny" but he cites no authority for the proposition that an alleged larcenist under circumstances such as this can rely on the doctrine of constructive possession so as to claim that no trespass was com-

mitted by him when he later abstracted funds belonging to his employer from a receptacle owned by the employer.

In *Nolan* our predecessors adopted certain of the English cases maintaining the various distinctions between embezzlement and larceny. In none of them is there any authority for extending the established doctrine of constructive possession to any alleged wrongdoer not in actual possession and the case of *Reg.* v. *Wright,* Dears & B. Crown Cas. 431, 441, 442, cited with approval therein shows that the accused must have actual possession before he can successfully maintain that his crime was embezzlement rather than larceny. In that case, the safe, furnished by the employer, was located in the home of the defendant used as the branch office of a bank whose main office was in another town. He took money of the bank from the safe after it had been placed therein and was convicted of larceny from the constructive possession of his employer, Judge Crowder, one of the concurring judges saying, "The fact that the prisoner had the entire control over the premises makes no difference. If he took the money from the safe for the purposes of the bank, he did so as a part of his duty; but if he took it for his own purposes he was guilty of larceny."

The reliance by him upon *Morgan* v. *Commonwealth,* 47 S.W. 2d 543 (Ky. 1932) is misplaced. There the Court found exclusive and actual possession of the receptacle and the funds stolen by the defendant to have been always in the defendant, the Court stating at page 544 as follows:

> "Although the company had the right to demand the funds of him at any time, and although the company could potentially enter the safe by opening the sealed envelope and apprising itself of the combination, yet it was not intended by the company that it should interfere with appellant's control and possession of the contents of this safe and the funds of the company unless and until some condition which had not occurred in this case at the time of the conversion had

> come to pass. It is quite manifest that the possession of these funds at the time they were converted was in the appellant and that it had not yet become that of the Western Union. This being true, the conversion amounted to an embezzlement and not larceny."

The factual situation presented in *Morgan* is not presented by the record here.

The trial court as an advisory instruction to the jury stated that a taking from the possession of the Town of Leonardtown was a necessary element of the crime of larceny charged under count four of the indictment. There was evidence to support this instruction and it was a correct statement of the law. There was no request by the appellant that the term "possession" be further defined.

For these reasons we hold that the trial court properly denied appellant's motion for judgment of acquittal as to the larceny count and that the trial court correctly advised the jury as to the law of larceny applicable to the facts presented in evidence.

JUDGMENTS AFFIRMED.